UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

AARON MEDICAL TRANSPORTATION, INC.

Employer

and

CASE 22-RC-070888

HUDSON COUNTY UNION LOCAL 1 AMALGAMATED Petitioner

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE DATED JUNE 12, 2013

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STATEMENT OF THE CASE

The Employer, Aaron Medical Transportation, Inc. ("Aaron"), hereby provides this Brief in Support of Exceptions to the June 12, 2013 Decision of the Hon. Joel P. Biblowitz, A.L.J (the "Decision"). For purposes of this Brief, Aaron adopts the Statement of the Case provided in the Decision.

ARGUMENT

As the Decision indicates, Aaron's first objection to the March 22, 2013 rerun election in this matter concerns the disenfranchisement of voters due to the timing of the election with respect to the opening and closing of the polls. In the interest of enabling the greatest number of eligible employees to vote, Aaron suggested to the National Labor Relations Board (the "Board") election times more inclusive than the times that ultimately appeared in the Notice of Second Election (the "Notice"). Aaron first proposed that the election take place between 12:00 pm and 8:00 pm and later revised its suggestion to 1:00 pm to 10:00 pm for even greater inclusiveness. For its part, Hudson County Union Local One Amalgamated (the "Union") suggested that the election take place between 7:30 am and 10:30 am, with a second session between 3:00 pm and 5:00 pm. Ultimately, the Board advised via the Notice that the election would take place between 12:00 pm and 6:00 pm, with a second session between 10:00 pm and 12:00 am. No reason ever was given for the rejection of the more inclusive polling times proposed by Aaron.

As a result of the above, a substantial number were unable to vote due to their work shifts beginning and ending during the window in which the polls were closed. Such circumstances explain the dramatic decrease in voter turnout between the January 27, 2012 election (in which 89 employees voted) and the March 22, 2013 rerun election (in which only 49 of 109 employees voted, one of whom, Carlos Chong, actually was ineligible and should not have been included in the Excelsior list).

In support of the above, at the May 15, 2013 hearing before Judge Biblowitz, Aaron provided the testimony of a sampling of 9 eligible voters who were disenfranchised. Each of the individuals testified that she or he wanted to vote but was unable to do so as a result of the timing of the election. In particular, the employee witnesses testified to punching in and out of work on the election date at the following times:

Stephen Kovalcik 5:45 am - 6:18 pm

Marisa Mucka 8:00 am - 7:42 pm

Brian Smith 5:45 am - 6:18 pm

Aja Aponte 7:56 am - 6:41 pm

Landi Lopez 8:10 am - 8:02 pm

Ivan Sepulveda 8:00 am - 8:11 pm

Jihare Boutaib 11:51 am - 7:45 pm

Mohammed Azeez 8:53 am - 6:00 pm

Kandis Devita 9:00 am - 8:05 pm

In regard to the above times, please refer to Exhibits 1-9 to the transcript of the May 15, 2013 hearing (hereinafter, "Trans."). As the above times indicate, in order to vote, each of the employee witnesses would have had to either wait several hours or make a special trip back to Aaron's facility once the polls reopened at 10:00 pm. Pursuant to NLRB Casehandling Manual Section 11302.3 (emphasis added):

The hours of an election depend on the circumstances of each case. The voting period(s) should be adequate to permit all voters, at their option, to cast votes either on employer time or on their own time, without making a special trip to vote... It is better to err on the side of allowing too much time than too little.

Notably, Section 11302.3 is not addressed or even mentioned anywhere in the Decision.

Moreover, in the present matter, several of the employees testified to having compelling reasons not to make a special trip back to the Aaron facility to vote (which special trip, again, the employees were not required to make). For example, Ms. Aponte explained, "I am a single mother and I have a 5 year old, and I am not going to bring my 5 year old at 10:00 pm to go vote." Trans. at 32:13-14. Mr. Lopez has a pregnant wife and a 4-year old at home. Id. at 37:6-7. Mr. Sepulveda also has a wife and children at home and lives in Jersey City, far from Aaron's Hackensack location. Id. at 43:10-12; 46:2-7. Mr. Kovalcik also lives significantly far away. Id. at 8:12-16. Mr. Azeez takes care of his mother. Id. at 59:23-25. Ms. Mucka had to attend a baby shower after her shift. Id. 13:22. Mr. Smith had matters to attend to at home due to his heavy work schedule during the week. Id. at 19:17-21. Ms. Devita takes an ambulance home with her and takes calls from midnight through 8:00 am. As such, she has limited time for her family and errands. Id. at 70:13-20.

At the May 15, 2013 hearing, the Union representatives attempted to argue (inappropriately) that (1) the employee witnesses should have returned to the Aaron facility to vote during work hours; and (2) Aaron was obligated to provide the employees with time to do so. The Union's first argument fails on the facts, and the second on the law.

Regardless of what they Union feels the employee witnesses "should" have done, their testimony revealed that they were unable to return to the Aaron facility to vote during the work day. For example, in response to your Honor's questioning, Ms. Mucka testified, "I do about eight calls a day, so I didn't have a break." <u>Id</u>. 15:14-15. Ms. Mucka further testified that she always "work[s] straight through from 8:00 to 8:00." <u>Id</u>. 16:13-16. Mr. Lopez testified that he mainly works in the Jersey City area and does not have downtime. <u>Id</u>. 38:8-20. Mr. Sepulveda explained:

"I'm an EMT. I don't get downtime. I do about seven, maybe eight calls a day. Every hour I'm doing a call and every call takes 45 minutes."

Ms. Boutaib also described her job duties:

- A: "Well, I pick up wheelchair patients, load them into the van, and then take them to their doctor's appointment or whatever the destination is."
- Q: "Do those patients usually have a schedule of their own in terms of when they need to be at a particular place?"
- A: "Yeah. They usually have like a doctor's appointment that you need to get them to at a certain time."

<u>Id</u>. 54:15-21.

Mr. Azeez also confirmed: "I'm busy, busy all the [sic] day." <u>Id</u>. 61:14. Mr. Azeez further clarified in response to the attempted cross-examination by the Union representatives:

- Q: "How were you able to come back in the first election and vote, but you're not able to come back in the second election and vote?"
- A: "It depends on the calls, sir. It's doctor's appointments and dialysis patients, so..."

<u>Id</u>. 63:15-20.

The Union's second attempted argument, that Aaron was obligated to provide eligible voters with time to vote during working time, also fails. As the previously cited employee testimony makes clear, the nature of Aaron's healthcare transportation business makes providing "breaks" to employees very difficult. In that regard, several of the employees testified to often not even stopping for meals. See id. at 15:18-19 (Ms. Mucka); 57:6-9 (Ms. Boutaib); 73:16-19 (Ms. Devita). Furthermore, contrary to the Union's position, the employer is not required to provide for voting on working time unless there is a prior agreement to that effect. There was no such agreement in the present matter. With respect to the preceding, NLRB Casehandling Manual Section 11330, "Voting on Employer Time", provides in relevant part (emphasis added):

Where it has been decided that eligible voters may vote during work hours, specific arrangements should be made in this respect... Except where the number of employees is small, permitting them to leave their work at will and not by specific arrangement may result in (a) undue disruption of production and (b) upsetting the regular work flow.

Contrary to the language of Section 11330 above (which, like Section 11302.3, is not even mentioned in the Decision), in the present matter it never was decided that eligible voters may vote during work hours. Moreover, the specific concerns expressed in the Casehandling Manual are particularly applicable in Aaron's case, as detailed in the previously cited employee testimony concerning the nature of the job. It also should be noted that NLRB Casehandling Manual Sections 11330.1 – 11330.4 all further address the issue of voting on working time, and provide for such suggested courses of action as a voting schedule or departmental shutdown (which would have been impossible in Aaron's case). In any event, where it has been determined that voting will take place on working time (which never occurred in the present case), Section 11330.4 notes that, "The method of releasing voters must be made clear to all parties and should be resolved well in advance of the election." To the contrary, none of the preceding issues regarding voting on working time was raised at any time prior to the March 22, 2013 election by the Union or the Board.

* * *

The "disenfranchisement test", entirely ignored in the Decision, typically applies to situations in which some, but not all, employees [are] alleged to have been denied the chance to vote." NLRB v. City Wide Insulation of Madison, Inc., 370 F.3d 654, 658 (7th Cir. 2004), citing Wolverine Dispatch, Inc., 321 N.L.R.B. 796, 796-798 (1996). The present matter concerns just such a situation. "Under the disenfranchisement test, an election will be set aside if the number of employees **possibly** disenfranchised is sufficient to affect the election's outcome." <u>Id</u>. at 659, citing Wolverine Dispatch at 797 (emphasis added).

In regard to the March 22, 2013 election, employee testimony indicated that at least 9 employees were in fact disenfranchised by the timing of the election. As the pending outcome of the election was 26 votes for the Union and 22 votes against (a 4-vote differential and a 2-vote swing), with 1 challenged ballot, such disenfranchisement was more than sufficient to affect the

election's outcome. Furthermore, the Union's contentions concerning what the employee witnesses "could" or "should" have done in the opinion of the Union is of no moment: the standard, as set forth above, requires only a showing that the employees were "possibly disenfranchised." That standard has more than been satisfied in this case.

Finally, the issue was raised at the May 15, 2013 hearing that Aaron had, via a September 14, 2012 Stipulation and Waiver, agreed to conduct the March 22, 2013 election according to the same schedule as the January 27, 2012 election. Those circumstances should not affect the determination on the disenfranchisement of eligible voters, as it is undisputed that, after further consideration of the ability of all employees to vote and in response to the Board's queries regarding election details, Aaron twice proposed a far more inclusive polling period.

As all of the foregoing indicates, the Regional Director was correct to find that Aaron's first objection to the March 22, 2013 election raised "substantial and material issues which can best be resolved on the basis of record testimony at a hearing[.]" That record testimony, provided by 9 employee witnesses, flatly confirmed that the employees were disenfranchised. In an election in which the Union prevailed by only 4 votes, and in which only 49 of 109 eligible employees voted, it would be grossly unjust for the Board to ignore such disenfranchisement. The opposing arguments contained in the Decision, which do not address the Casehandling Manual sections referenced herein and which ignore the disenfranchisement test, are refuted at length in Aaron's Exceptions to the Decision, filed herewith.

Aaron respectfully submits that the Board should set aside the March 22, 2103 election and schedule a new election, to take place within carefully chosen polling times that will permit the greatest number of employees to vote.

Respectfully submitted, ARCHER & GREINER, P.C. Attorneys for the Employer

By:

Daniel C. Ritson

Dated: June 26, 2013